

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY CHEERS,

Defendant-Appellant.

UNPUBLISHED

February 16, 1999

No. 205410

Wayne Circuit Court

LC No. 96-504163

Before: Sawyer, P.J., and Bandstra and R.B. Burns*, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of larceny over \$100, MCL 750.356; MSA 28.588, assault with a dangerous weapon, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two to five years in prison for the larceny over \$100 conviction, two to four years in prison for the assault with a dangerous weapon conviction, and two years in prison for the felony-firearm conviction, to be served consecutively with the other two sentences. We affirm.

Defendant's sole issue on appeal is that the prosecution failed to present sufficient evidence to support his felony-firearm conviction. We disagree. The elements of felony-firearm are that defendant possessed a firearm during the commission or attempt to commit a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1, (1996). In *Davis*, *supra* at 53-54, the victim's testimony that the defendant pointed something in her back that felt like a gun and the second victim's testimony that he saw the defendant pointing a gun towards the first victim constituted sufficient evidence to establish the elements of felony-firearm beyond a reasonable doubt. Additionally, in *People v Mason*, 96 Mich App 47, 51; 292 NW2d 480 (1980), this Court stated that the prosecutor need not present evidence of operability as an element of felony-firearm. To require proof of operability would prevent prosecution in cases where the weapon is not recovered even though testimony supports its existence. *Id.*

Here, complainant testified that a man pointed a gun at him and told him, "You didn't see anything." He further testified that it was a dark-colored handgun. He later identified the man with the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

gun as defendant. Complainant clearly witnessed defendant pointing a gun at him in the morning when he was only sixty to seventy-five feet away. He reported to the yard master that he saw a man stealing tires from the rail car and that the man pointed a gun at him. Complainant was so shaken up from having a gun pointed at him that he wanted to go home after the incident. Given the relevant case law, complainant's testimony was sufficient to prove that defendant possessed a firearm during the commission of an assault with a dangerous weapon and larceny. This evidence, when viewed in the light most favorable to the prosecution, was sufficient to convict defendant of felony-firearm beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

We affirm.

/s/ David H. Sawyer

/s/ Richard A. Bandstra

/s/ Robert B. Burns